In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 668

PAUL BLACKFORD, WILLIAM W. BLACKFORD, CARROLL D. HAGER, ROBERT HAGER, RONALD L. HAWK, GEORGE NIELSEN, HANS NIELSEN, and MARSHALL WEDDLE, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 451-456) is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 5, 1952 (R. 456-460), and a

joint petition for rehearing was denied on February 21, 1952 (R. 469). The petition for a writ of certiorari was filed on March 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioners' convictions for conspiracy to violate the National Stolen Property Act.

2. Whether the convictions on the conspiracy count are invalid because the jury were in disagreement as to convictions on the substantive count.

STATUTE INVOLVED

Section 7 of the National Stolen Property Act, 53 Stat. 1179 (18 U.S.C. (1946 ed.) 418a), provided:[1]

> If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.

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[1] This statute was repealed by Act of June 25, 1948, c. 645, 62 Stat. 683, sec. 21, effective September 1, 1948, and is now covered generally by 18 U.S.C. 371.

Section 3 of the National Stolen Property Act, 48 Stat. 794, as amended, 53 Stat. 1178 (18 U.S.C. (1946 ed.) 415),[2] provided in pertinent part as follows:

> Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *

STATEMENT

An indictment in two counts (R. 4-11), filed in the United States District Court for the District

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[2] This section is now covered by 18 U.S.C. (Supp. IV) 2314, which reads in pertinent part as follows:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
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> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

It will be noted that the present language eliminates the clause, "theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin."

of Kansas, charged that from about June 30 to July 7, 1948, petitioners (1) conspired to violate the National Stolen Property Act by agreeing to transport in interstate commerce a quantity of wheat, exceeding $5,000 in value, theretofore stolen, feloniously converted, and taken feloniously by fraud; and (2) transported in interstate commerce from Kansas to Oklahoma 9,871 bushels of wheat of value exceeding $5,000 knowing the same to have been stolen, converted and taken by fraud.

Following a trial by jury, petitioners were found guilty on the conspiracy count (R. 13-15), and were sentenced to terms of imprisonment ranging from 3 to 5 years. Fines of $5,000 and $10,000, respectively, were imposed upon two of the petitioners.[3] The jury failed to agree on the second count (R. 448). Upon appeal, the convictions on the first count were unanimously affirmed (R. 456-460).

The evidence adduced by the Government disclosed a basic scheme, carried out five times during the week in question, whereby petitioners brought their tractor trailer trucks, of approximately 1,000 bushel capacity apiece (R. 192-193,

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[3] William W. Blackford, Hans Nielsen, and Carroll D. Hager were sentenced to five years' imprisonment. Blackford and Nielsen were also fined $5,000 and $10,000, respectively. Execution of Hager's sentence was suspended and he was placed on probation for five years. The remaining petitioners were sentenced to three years' imprisonment (R. 20-28).

201, 273) to the grain elevators of the McCoy Grain Company at Sublette, Kansas, and while buying and causing approximately 500 bushels to be loaded on each truck through the spout connected with the scales (R. 43-46), obtained additional wheat through other spouts, unnoticed by the two employees of the grain company during the loading operation (R. 62-63, 181-182, 205-206, 210, 220, 223-224, 237-238, 241, 262). Petitioners then sold the wheat in Oklahoma at a rate less per bushel than they paid in Kansas, but for higher aggregate totals because of the additional wheat for which they did not pay. They paid $25,081 for the 12,110 bushels in Kansas, divided among 24 truckloads, and sold from the same 24 truckloads in Oklahoma, approximately 22,000 bushels, for which they received approximately $20,334 more than the total purchase price (R. 43-46, 295-296).

In formal written admissions of fact, petitioners conceded that they owned transportation equipment or were engaged or employed in the business of buying, selling, and trucking grain from June 20, 1948, through July 7, 1948, in Kansas and adjoining states (R. 47). Between the afternoon of June 29 and early morning of June 30, five of petitioners signed applications for entry of trucks at the Syracuse, Kansas, port of entry, naming the three other petitioners as owners of the trucks, and claiming that their destination was Deerfield, Kansas, to pick up wheat to be transported to Dal-

las, Texas (R. 47-49). On June 30, 2,530 bushels of wheat were purchased at Sublette, Kansas, at $2.07 per bushel and loaded on trucks driven by the same five petitioners (R. 43); the same trucks appeared in Woodward, Oklahoma, that midnight or early in the morning (see R. 274), July 1, with 3,219-2/3 bushels of wheat, of which the Sublette wheat was admitted to be a part, and which was sold by one of petitioners at the lesser rate of $2.02 and $2.03 per bushel (R. 43). Purchases at Sublette and sales of larger quantities at lower prices at Woodward were repeated in substantially the same fashion on four more trips arriving and leaving Sublette on July 1, July 4, July 5, and July 6, respectively.[4] While the sales were admittedly

[4] *Petitioners' admissions of purchases and sales* (R. 43-46):

Date	*Purchases at Sublette, Kansas.*		*Sales at Woodward, Oklahoma.*	
	Bushels	*Price*	*Bushels*	*Price*
Jun. 30	2,530	$5,327.00		
Jul. 1			3,219 + 40 lbs.	$6,529.38
Jul. 1	2,540	5,257.80		
Jul. 2			4,178 + 30 lbs.	8,451.05
Jul. 4	2,510	5,191.20		
Jul. 5			3,913 + 40 lbs.	7,697.86
Jul. 5	2,030	4,180.80	5,100 + 20 lbs.	10,098.65
Jul. 6	2,500	5,125.00		
Jul. 7			4,579 + 10 lbs.*	12,639.01*
	12,110	$25,081.00	21,991 + 20 lbs.*	$45,415.95*

(cont'd next page)

made in Woodward, Oklahoma, petitioners claimed, in each of their applications upon reentry into Kansas, that the trucks came from Amarillo, Texas, and were to return there. In the case of the applications of July 2, petitioners listed a town other than Sublette as the place from which wheat was to be picked up (R. 50-58).

Petitioners further admitted that petitioner W. W. Blackford, "on various dates during 1948 and at various places," including Kansas, "used the name E. L. Long, Long Grain Company of Joplin, Missouri and J. Long in connection with the purchase and sale of wheat, although he never at any time maintained offices in Joplin and to his knowledge there was not a concern known as the Long Grain Company in Joplin, Missouri, or a

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	Bushels	*Price*
	21,991 + 20 lbs.	$45,415.95
	12,110	25,081.00
Wheat sold in Oklahoma for which payment was not made in Kansas:	9,881 + 20 lbs.	$20,334.95

* The July 7 sale in Oklahoma included wheat from a sixth truck. The total sale was admitted by petitioners in the amount of $13,335.07 (R. 46), from which the Government computations deducted the price of the wheat in the largest of the six loads (R. 296). The Government totals of 21,991 bu. 20 lbs., and $45,415.95 (R. 295) accordingly reflect a smaller figure for the July 7 sale than that admitted by petitioners.

man known as E. L. Long or J. Long in the grain business at Joplin, Missouri" (R. 50).

Testimony adduced by the Government disclosed that the purchases at Sublette began on June 30, 1948, when petitioner William Blackford, representing himself as "Mr. Long" of the Long Grain Company, arranged for the purchase of wheat. On the same day, the five tractor trucks arrived (R. 61) accompanied by certain of the petitioners later identified in court by the manager (R. 64). Wheat to be sold and loaded on a truck was required to be weighed in an automatic scale at the top of the elevator; it then flowed into a bin from which there was only one spout to the truck alleyway (R. 62-63, 182). However, there were eleven additional spouts in the alleyway, and the spouts, with possibly one exception, were not within the range of view of the two operators of the elevator, since one operator was required to be at the top of the elevator with the scales and the other was required to be at a point where the grain was started on a conveyor belt to the scales (R. 181-182, 262). The spouts could be opened or closed by ropes hanging down into the driveway or against one wall, and they could run from 108 to 120 bushels per minute (R. 262). Four witnesses, persons in the neighborhood who had looked into the truck alleyway during part of the loadings, testified that they had seen grain pouring into the trucks from a spout or spouts other than the spout from the scales (R.

205-206, 210, 220, 223-224, 237-238, 241).[5] A further witness testified that petitioners Hans Nielsen and William Blackford, in seeking to have him join them in September of 1948, had explained to him how they had "made a pretty good hit" at Sublette by getting into the bins by means other than the regular hopper (R. 338-339).[6] Other witnesses placed various others of the petitioners at the scene and times of the various loadings (R. 182-183, 193, 200).

The Government further adduced testimony showing a shortage of 5,718 bushels at the Sublette elevator (R. 79, 121) of which only 1,700 bushels could be attributed to normal shrinkage (R. 83, 86).[7] Four elevator operators with experience

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[5] The only grain loaded out of the elevator into a truck, other than the 24 loads of petitioners, was a load of 422 bushels for one Seigal (R. 124, 192).

[6] Petitioners sought to impugn the testimony of this witness by the fact that he had pleaded guilty to a felony in March 1950, and hoped to be released on parole in June 1951 (R. 339-343, 373-377).

[7] The shortage was computed from the date when the elevator was empty, January 19, 1948, to the date of an inventory on August 10, 1948. The amount of grain on hand on August 10, 1948, was computed by the Warehouse Examiner, in charge of administration of the U. S. Warehouse Act for the district, from an inventory and soundings taken by one of his examiners on August 10, 1948. The Warehouse Examiner, in December 1950, went to the elevator to establish the pack factor and the effective depth factor employed in the inventory by more precise measurements applied to the particular elevator, rather than by the less accurate estimates of these factors employed in the routine inventories taken by the examiners (R. 104-106, 108-109, 113, 139-143, 145, 417).

covering 123 elevators confirmed this maximum estimate (R. 125, 133, 137, 148, 154, 159, 162, 167-168, 170, 173-175).

Petitioners did not take the stand or adduce any evidence showing that they obtained the additional wheat from any sources other than the extra spouts of the Sublette elevator.

ARGUMENT

1. Petitioners' argument is in effect a contention that the evidence is insufficient to support the verdict. While to some extent they attack the sufficiency of the evidence to show that the wheat was stolen (Pet. 6), the main thrust of their argument is that the evidence does not establish that the conspiracy embraced the transportation of stolen wheat of the requisite jurisdictional amount of $5,000. The facts, as set forth, in the statement, completely refute this contention.

Petitioners' own written admissions of fact, formally filed in this case show that in repeated trips petitioners paid from $2.05 to $2.07 per bushel for wheat and immediately thereafter sold it at the lower rate of $1.97 to $2.03 per bushel (*supra,* p. 6 and fn. 4). Such a transaction could be profitable only if more wheat were actually taken than was paid for. Petitioners paid for an aggregate of only 12,110 bushels in Kansas and appeared promptly thereafter in Oklahoma with an aggregate of nearly 22,000 bushels for which they obtained $20,334.95 more than any payments

shown to have been made by them (*supra,* p. 6 and fn. 4). The jury could properly conclude that the extra wheat came from the extra spouts at the Kansas elevator which were not supposed to be opened to petitioners' trucks but were seen to be so opened by four witnesses (*supra,* pp. 8-9).[8] The jury could also properly conclude from these facts that the value of the wheat which petitioners planned to steal was more than $5,000. In fact, the July 5th transaction itself showed an excess of more than $5,000. (See fn. 4, pp. 6-7.)

Petitioners adduced no evidence whatsoever of any source for the 9,881 bushels of extra wheat. They now intimate in their brief (Pet. 9) that they might have bought the additional wheat en route. The jury was not, however, required to speculate on that remote possibility in the absence of the proof which could have been so easily adduced in such an event. And a showing of some additional purchases would still fall far short of explaining the repeated practice of buying wheat at one price per bushel and selling it later that night at a lesser rate.

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[8] Petitioners' attempt to impute some significance to the fact that the particular witnesses who observed the extra spouts in operation did not identify petitioners (Pet. 6-7) is devoid of merit in light of petitioners' own admissions of their presence at the scene at the time in question (*supra,* pp. 5-6), the identification of petitioners at the time and place by other witnesses (*supra,* pp. 8-9), and the uncontradicted testimony that except for one purchase of 420 bushels by one Seigal, no other truck sales were made from the elevator (*supra,* fn. 5, p. 9).

In view of their own admissions which more than sufficiently established the jurisdictional value of the stolen wheat, petitioners' attempt to impugn the accuracy of the evidence as to the warehouse shortage is obviously unavailing. Their contention that the warehouse shortage was computed on an inventory made long after the loadings in question (Pet. 10) is without foundation. The inventory was taken August 10, 1948, and only the assumptions involved in the inventory were later corrected, employing more precise measurements and elimination of estimates employed in more routine inventories. See *supra,* pp. 9-10 and fn. 7.

The argument that a "tolerance" of three percent is "recognized and allowed by the Federal Warehouse Examiners to cover shrinkage and possible errors in inventory, which in this case amounts to 7,202 bushels" (Pet. 7) is contradicted by the testimony of the examiner in charge of administration of the United States Warehouse Act for the district comprising the southwest States, who testified that, while ordinarily an outside tolerance of three percent was recognized, when the special work that had been performed in this case was performed at a particular elevator, the stock would be invoiced within a half of one percent (R. 141-142). It is clear that on any basis, the shortage was shown to be in an amount far in excess of $5,000 in value, and thus in excess of the amount

needed to establish a conspiracy to commit a federal offense.

The evidence on the issue of the value was much clearer and more concrete than the evidence held sufficient in *Carlson* v. *United States,* 187 F. 2d 366 (C.A. 10), certiorari denied, 341 U.S. 940, also involving transportation of stolen wheat. Since the trial court and the unanimous Court of Appeals below have, on the basis of abundant evidence, sustained the jury's verdict we submit that there is no occasion for further review. See *Kann* v. *United States,* 323 U.S. 88, 93; *United States* v. *Johnson,* 319 U.S. 503, 518; *Delaney* v. *United States,* 263 U.S. 586, 589-590.

2. Petitioners' further reliance (Pet. 2-3) on the disagreement of the jury on the second count charging the substantive offense, is without merit. There is no necessary inconsistency between conviction on the conspirary count and disagreement on the substantive count. *Pinkerton* v. *United States,* 328 U.S. 640, 643; *United States* v. *Rabinowich,* 238 U.S. 78, 85; *Carlson* v. *United States,* 187 F. 2d 366, 369-370 (C.A. 10), certiorari denied, 341 U.S. 940.

CONCLUSION

No conflict of decisions or question of general importance is involved in this case. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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